

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-2 0835

To be argued by
ALLAN S. MOLLER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. WALTER WOLFRATH,
Petitioner-Appellee,
-against-

J. EDWIN LaVALLEE, Superintendent, Clinton
Correctional Facility,

Respondent-Appellant.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLANT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellant
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3443

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ALLAN S. MOLLER
Assistant Attorney General
of Counsel

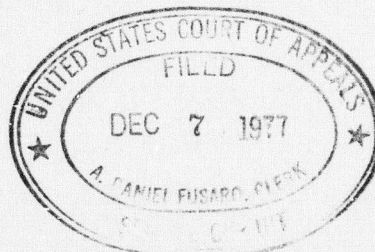


TABLE OF CONTENTS

	<u>PAGE</u>
Questions Presented.....	2
Statement of the Case.....	2
POINT I - PETITIONER HAS FAILED TO SUSTAIN THE BURDEN OF PROOF REQUIRED FOR A SHOWING THAT THE CONFESSION WAS INVOLUNTARY, AND THE CONFESSION WAS PROPERLY ADMISSIBLE.....	13
POINT II - THE EXCLUSIONARY RULE SHOULD NOT BE EXTENDED TO THE FACTS OF THIS CASE, SINCE ITS PURPOSES WILL NOT BE FURTHERED THEREBY.....	17
POINT III - THE INTRODUCTION OF PETITIONER'S CONFESSION AT TRIAL, EVEN IF INVOLUNTARY, IS HARMLESS ERROR.....	24
Conclusion.....	32

TABLE OF CASES

	<u>PAGE</u>
<u>Bledsoe v. Nelson</u> , 432 F. 2d 293 (9th Cir. 1970).....	28
<u>Chapman v. California</u> , 386 U.S. 18 (1967).....	24, 25, 26
<u>Elkins v. United States</u> , 364 U.S. 206 (1960)...	20
<u>Haley v. Ohio</u> , 332 U.S. 596 (1948).....	24
<u>Harrington v. California</u> , 395 U.S. 250 (1969)..	25, 26
<u>Haynes v. Washington</u> , 373 U.S. 503 (1963).....	24
<u>Jackson v. Denno</u> , 378 U.S. 368 (1964).....	8, 21
<u>LaVallee v. Delle Rose</u> , 410 U.S. 690 (1973)....	15, 16
<u>Lewis v. Henderson</u> , 520 F. 2d 896 (1976).....	23
<u>Milton v. Wainwright</u> , 407 U.S. 371 (1972).....	25, 26
<u>Payne v. Arkansas</u> , 356 U.S. 560 (1968).....	24, 25
<u>Philips v. Neil</u> , 452 F. 2d 337 (6th Cir. 1971).....	28
<u>Smith v. Estelle</u> , 519 F. 2d 1267 (5th Cir. 1965).....	28
<u>Townsend v. Sain</u> , 372 U.S. 293 (1962).....	22, 23
<u>United States v. Bayer</u> , 331 U.S. 532 (1946)....	31
<u>United States v. Calandra</u> , 414 U.S. 339 (1974).....	20
<u>United States v. DuVall</u> , 537 F. 2d 15 (2d Cir. 1976).....	27
<u>United States v. Mitchell</u> , 322 U.S. 65 (1944)..	8
<u>United States v. Sigal</u> , 500 F. 2d 1118 (10th Cir.) cert. den. 419 U.S. 954 (1974).....	28

	<u>PAGE</u>
<u>United States v. Williams</u> , 524 F. 2d 407 (2d Cir. 1975).....	27
<u>United States ex rel. Galloway v. Fogg</u> , 403 F. Supp. 248 (S.D.N.Y. 1975).....	28
<u>United States ex rel. Hines v. LaVallee</u> , 521 F. 2d 1109 (2d Cir. 1975) <u>cert.</u> <u>den.</u> 96 S.C. 884).....	27
<u>United States ex rel. Moore v. Follette</u> , 425 F. 2d 925 (2d Cir.) <u>cert. den.</u> 90 S. Ct. 2189 (1970).....	26
<u>Wainwright v. Sykes</u> , 45 U.S.L.W. 4807 (June 23, 1977).....	15, 16, 26

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-2085

UNITED STATES OF AMERICA, ex rel. WALTER WOLFRATH,
Petitioner-Appellee,

-against-

J. EDWIN LaVALLEE, Superintendent, Clinton
Correctional Facility,

Respondent-Appellant.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLANT

This is an appeal from an order of the United States District Court for the Southern District of New York (Duffy, J.) dated July 27, 1977, ordering that the petitioner, who commenced a federal habeas corpus proceeding, be released from custody unless the state court promptly grants him a new trial and restores him to pre-trial status.

The District Court stayed its order pending appeal to this court, which has granted a scheduling order dated November 1, 1977.

Questions Presented

1. Did the District Court err in determining that petitioner's confession was involuntary and the product of mental coercion?
2. Are the purposes of the exclusionary rule furthered by its application to the facts of this case, or is its extension to the instant set of facts in error?
3. Is the introduction of petitioner's confession at trial harmless error, even if it were obtained involuntarily?

Statement of the Case

The Crime

On November 2, 1966, at about 8:00 p.m., the Don-Lee Studios, located at 130 West 57th Street, New York City, was robbed by petitioner. Marion and Don Sehnert, the operators of the studio, were present, as were their son and three clients. Detective Hanford responded to the robbery call and

arrived at the scene of the crime at approximately 8:20 p.m. Petitioner was not apprehended at that time, having left the premises approximately 10 minutes earlier.

The Apprehension, Confessions,
and Identification

Early in the morning of November 5, 1966, petitioner checked into the emergency room at St. Vincent's Hospital with a gunshot wound in his arm (1:29 a.m.). This wound was sustained in an incident unrelated to the robbery of the Don-Lee Studios.

A routine investigation of the gunshot wound was conducted by Patrolman James Emburey in the emergency ward of the hospital at 1:45 a.m. Petitioner told Emburey that someone had tried to rob him as he was walking South on Tenth Avenue between 22nd and 23rd Street and when he resisted he had been shot. Patrolman Emburey, having concluded the interview, left the hospital and resumed patrol duties.

At approximately 3:45 a.m. Patrolman Emburey and Patrolman Camera, in the normal course of their duties, approached a vehicle on 8th Avenue between 22nd and 23rd Street. Patrolman Camera removed a revolver from the occupants' car and they were arrested and taken to the stationhouse for

questioning. The names of the occupants were Robert Wyatt and Linda Wyatt. Significantly, Robert Wyatt had worked for the Sehnerts earlier in 1966 and prior to the robbery at Don-Lee Studios.

At about 5:00 o'clock on the same morning, Patrolman Emburey, Patrolman Camera, Detective Spano, Detective Chardrand, and the Wyatts (being in custody at this time), went to St. Vincent's Hospital for a second interview with petitioner.

Out of the presence of the Wyatts, Detective Spano approached petitioner and advised him of his Miranda rights, and then told him that the police had the Wyatts in custody and that they had given Spano the full story concerning the gunshot wound. Upon learning this, defendant said that the previous story he had given to Patrolman Emburey about having been shot and robbed was false: that he had, in fact, accidentally shot himself. He then voluntarily confessed to the robbery of the Don-Lee Studios three days earlier.

Detective Hanford, who, as previously noted, was assigned to the Don-Lee investigation, upon being advised that the police had in their custody a man who had confessed to the said robbery, contacted Mr. & Mrs. Sehnert and advised them

that he had somebody he wanted them to look at for possible identification. At no time did he tell the Sehnerts that the suspect had confessed to the crime, only that he had someone he wanted them to see.

On November 6, 1977, the Sehnerts, along with Detective Hanford, went to Bellevue Hospital (where petitioner had been transferred from St. Vincent's Hospital) for the purpose of viewing petitioner.

Detective Hanford left Mr. & Mrs. Sehnert near the elevator landing on the floor where petitioner was being treated at Bellevue and walked down the hallway to the point where petitioner was sitting in a wheelchair with his back to the elevators. Detective Hanford advised him of his constitutional rights. Petitioner then confessed that he had committed the robbery at 130 West 57th Street with Robert Wyatt, a former employee, who had set up the job. Hanford then brought the Sehnerts down the hallway to see the petitioner. Mrs. Sehnert identified him as the perpetrator and he said "I did it".

Prior Proceedings

On March 14, 1968, Walter Wolfrath was convicted after trial (Postal, J. and a jury) of the crimes of robbery

in the first degree (two counts); burglary in the third degree and criminally possessing a loaded firearm as a felony (former Penal Law §§ 2124, 404 and 1897) and was sentenced to State Prison as a fourth felony offender for a term of sixteen years to life imprisonment.

That judgment was affirmed unanimously by the Appellate Division, First Department without opinion on May 29, 1969 (32 A D 2d 742).

On appeal from the Appellate Division, First Department, the Court of Appeals affirmed the conviction in a unanimous decision dated April 9, 1970 (26 N Y 2d 943).

Wolfrath's petition for a writ of habeas corpus was denied by the United States District Court, W.D.N.Y. (Port, J.) by memorandum decision and order dated January 4, 1974 and his application for a certificate of probable cause was similarly denied on April 3, 1975.

The Second Circuit Court of Appeals, by order dated September 3, 1975, denied a motion for a certificate of probable cause but remanded the appellant's involuntary confession claim for a hearing. The matter was transferred to the District

Court for the Southern District of New York in accordance with the remand of the Court of Appeals by order dated September 19, 1975 (Port, J.).

District Court Proceedings

The District Court (Duffy, J.) conducted a series of evidentiary hearings to determine the voluntariness of petitioner's confessions. At the first, held on August 5, 1976, Walter Wolfrath was called as a witness. The time of the hearing was almost 10 years after the robbery took place, and the accuracy of the witness's statements is subject to doubt. The court said, "I do not think there is much in the way of examination or cross-examination" (A. 51).*

Wolfrath testified that he was an alcoholic and that at that time in his life he was drinking heavily. Upon cross-examination by Assistant Attorney General Ryan, Wolfrath, after first testifying that he had not been questioned at all by either Detective Spano at St. Vincent's Hospital or by Detective Hanford at Bellevue (A. 61), then said he didn't remember being questioned, "I know what the record says, you know" (A. 62).

* "A" refers to the Joint Appendix which is before the Court.

By memorandum and order of June 18, 1977, Judge Duffy set down for an immediate hearing the issue of whether or not petitioner's confession was involuntary by reason of the drugs that had been administered to him at St. Vincent's Hospital to diminish the pain from the gunshot wound (A. 44-49).

"The present state of the record is such that this Court is unable to determine whether the confession was the 'offspring of reasoned choice.' United States v. Mitchell, 322 U.S. 65, 68 (1944). No medical or other expert testimony has been introduced at the hearing before me or before the state court as to the effect of a 75 milligram dosage of Demerol on a person in Wolfrath's physical condition. The voluntariness of a confession given while under the influence of the indicated dosage is certainly subject to serious challenge. See, Jackson v. Denno, 378 U.S. 368 (1964)" (A. 48).

Pursuant to that order, a hearing was held on July 21, 1977 (A. 11-43).

The only witness who was called was Charles P. Felton, M.D., who testified on behalf of petitioner as to the possible effects that the administered drugs might have had on petitioner's state of mind at the time of the confession and hence on the voluntariness of the confession.

After testifying to his medical background (A. 12-14), Dr. Felton said that he was familiar with the case in that he had read the petitioner's medical records at St. Vincent's Hospital and Bellevue Hospital, as well as a portion of the trial records (A. 15).

On the basis of reading the St. Vincent's Hospital record, Dr. Felton testified that petitioner was admitted at 1:29 a.m. in the emergency room and that at 1:35 a.m. he received 10 milligrams of morphine sulfate. The next time he was given drugs of a type relevant to a voluntariness inquiry (the others being antibiotics, tetanus, etc.) was at 4:00 a.m., when he received 75 milligrams of Demerol and 200 milligrams of sodium luminal. Although the hospital records did not indicate when the patient was operated upon, Dr. Felton testified that in all probability he was operated upon for the gunshot wound sometime after 4:00 a.m. and prior to 5:00 a.m. The hospital record indicates that zylocaine was given at the time of the operation as a local pain killer and that petitioner was not given a general anesthetic (A. 34).

Upon direct examination the witness testified that the drugs administered to petitioner could cause mental clouding

(A. 27) Upon cross-examination by respondent's counsel, the following occurred:

"Q. When you described the effect of Demerol on a person in this case in the totality of the circumstances earlier, you suggested that if he were questioned he might have been in a dreamlike state and maybe not given statements totally in a voluntary manner; is that a fair statement?

A. That is.

Q. But that conclusion is based upon your general knowledge of the drugs in question and whatever references you might have gone to prior to this hearing with respect to the effect of these drugs; is that correct?

A. Yes, sir.

Q. You cannot say that with 100 percent assurance that in each and every case this, in fact, would be the condition of the person?

A. I cannot say that and would not what to say that." (A. 35)

Dr. Felton also testified that the effects of morphine sulfate (administered at approximately 1:45 a.m.) peak somewhere between 40 minutes and one and one-half hours after administration and that they then diminish, generally wearing-off in 4 hours (which would be during or immediately after the interview where the confession was given).

Thus, the only drug that this Court can be positive was actively operating in and possibly affecting the petitioner at the time of the confession was Demerol, which is an analgesic or pain killer effective for the control of pre-operative and post-operative pain. This conclusion must be reached because petitioner's counsel failed to question the witness on the effects of sodium luminal and zylocaine, which, if tending to go to the issue of voluntariness, surely would have been investigated. Further, the question as to whether or not alcohol affected petitioner's reason is purely speculative: Dr. Felton himself testified that the amount of alcohol petitioner had drunk 3 hours preceding admittance could have been as little as one drink (A. 21).

As to the demerol, the Physician's Desk Reference Book lists the side affects and adverse reactions, in part, as follows:

"Adverse Reactions and Contraindications: Demerol, hydrochloride is generally well tolerated and nontoxic in therapeutic doses. Side effects, although generally of minor importance, occur more frequently in the ambulatory than in the hospitalized patient. They are of brief duration and do not, as a rule, inconvenience the patient to an appreciable degree. They may

occur with the first dose or occasionally after several doses. With continued administration they usually subside. Dizziness is the most common side reaction. Patients receiving Demerol hydrochloride should, therefore, be warned against driving vehicles or unnecessarily exposing themselves to hazards."

Physician's Desk Reference
1452 (1970 ed.).

No other witnesses were presented by either party.

The Opinion

The district court stated that, based upon Dr. Felton's testimony, "I conclude that Wolfrath's statements in response to Detective Spano's questioning were not voluntary and should not have been admissible at trial" (A. 8). The opinion is included in full in the Appendix (A. 5-10).

The court then proceeded to determine whether the introduction of such testimony was harmless error and, in so doing, quoted a statement of defense counsel concerning the confession of petitioner to Detective Spano, "You know that without it, there would be nothing in this case" (T. 489a).^{*} However, at an earlier point in the same summation (not quoted

^{*} "T" refers to minutes of trial which have been submitted to this Court as an exhibit.

by the district court), defense counsel also stated, "I don't think there is any question but that without Mrs. Sehnert and and Mr. Sehnert there would be no case here" (T. 476).

However, the district court concluded that the error was not harmless and ordered a new trial or release of petitioner.

POINT I

PETITIONER HAS FAILED TO SUSTAIN
THE BURDEN OF PROOF REQUIRED FOR
A SHOWING THAT THE CONFESSION WAS
INVOLUNTARY, AND THE CONFESSION WAS
PROPERLY ADMISSIBLE.

The District Court ruled that the confession which petitioner gave to Detective Spano at the interview conducted at St. Vincent's Hospital was the product of mental coercion and that as a result a new trial had to be held. The court so ordered after conducting a hearing at which Doctor Felton testified as to the affect which the drugs administered to petitioner might have on his mental state.

At the outset, it must be noted that the petitioner did not call any witness who actually was present when the drugs were given to petitioner. In fact, the person who did testify as to petitioner's mental state could only speculate

as to same, since all he had before him were hospital records and trial transcripts. As was reported at the hearing, he could not and would not state to a certainty that petitioner's confession was involuntary and a product of mental coercion. While it was clear that a number of drugs had been given to the petitioner prior to the challenged confession (on the basis of the hospital records), the testimony as to their effects on petitioner was inconclusive. Thus Dr. Felton said the "drugs we are speaking about are known to cause a dreamlike sensation" (A. 17). But he never says that they in fact did produce such an effect on petitioner. Further, in answer to the question as to whether or not the statement made at 5:00 a.m. was involuntary, Dr. Felton said that the individual "may have had a false sense of security about him, and may have certainly made it easier for him or for anyone to extract a confession out of him" (A. 18) (emphasis added).

But surely the State should not be required to hold a new trial, 12 years after the event, on the basis of such inconclusive speculation, for that is all that Doctor Felton's testimony is. Indeed, it would be difficult, if not impossible, to locate some of the witnesses to the robbery at this late date. And if they were located, what then? Would their

testimony be accurate after 12 years? Isn't it more likely that their memories will have faded, with a more substantial likelihood that a miscarriage of justice will occur if there is a retrial than if the case is maintained in its present posture? But the District Court has ordered a retrial, which is tantamount to setting petitioner free: and this has been done on inconclusive evidence, contrary to the holding in LaVallee v. Delle Rose, 410 U.S. 690 (1973).

In LaVallee, the Supreme Court held that the burden in federal habeas corpus proceedings, challenging the voluntariness of confessions, is on petitioner to establish by clear and convincing evidence that the State court's determination was erroneous. This he failed to do. Therefore he is bound by the State court's determination.

Furthermore, in the case of Wainwright v. Sykes, decided by the Supreme Court on June 23, 1977 (45 U.S.L.W. 4807), the constitutionality of Florida's "contemporaneous objection" rule was challenged. The rule, which requires a party to make a motion to suppress evidence prior to trial, had not been complied with. When petitioner brought a federal habeas petition in the federal district court, claiming that certain exculpatory statements were inadmissible because he did not

understand his Miranda warnings, the respondent asserted as a defense the fact that he had not raised his objections to the introduction of such evidence prior to trial. The Supreme Court held that Florida's contemporaneous objection rule was constitutional and that petitioner's failure to move to suppress prior to trial was a bar to a habeas petition in federal court on such grounds, absent a showing of cause for non-compliance and some showing of actual prejudice.

There is an analogy between Wainwright v. Sykes, supra, and this case, in that petitioner, although he moved to suppress, did not challenge the voluntariness because of drugs at the hearing. He had an opportunity to do so, of course, but he failed to do so at the time. Under the reasoning of Wainwright and Delle Rose, then, he should be precluded from raising such an issue twelve years later.

Thus, on the authority of the above cited Supreme Court cases and the inconclusive nature of Dr. Felton's testimony, the District Court's opinion should be reversed.

POINT II

THE EXCLUSIONARY RULE SHOULD NOT
BE EXTENDED TO THE FACTS OF THIS
CASE, SINCE ITS PURPOSES WILL NOT
BE FURTHERED THEREBY.

This is not the usual case where a suspect is in custody and is being questioned about and confesses to a particular crime or series of crimes. Here petitioner was being treated at St. Vincent's Hospital for a gunshot wound in his arm. In his first interview with Patrolman Emburey, petitioner stated that he had been robbed. This interview was conducted as a result of a routine investigation required to be made in all cases where a person has been shot. The petitioner was not taken into custody as a result of the first interview. Only after Patrolman Emburey and another, Patrolman Camera, had stopped Mr. & Mrs. Wyatt and spoken to them did it become apparent that there was a connection between the Wyatts and petitioner. Hence, Patrolmen Emburey and Camera, and Detectives Spano and Chardrand with the Wyatts arrested and in custody, proceeded to St. Vincent's Hospital to interview petitioner (the 5:00 o'clock interview which the district court held was coercive and hence involuntary).

At the Huntley hearing held on petitioner's motion to suppress the confession at St. Vincent's, Detective Spano testified that he entered petitioner's hospital room (A. 67), identified himself, and advised petitioner of his Miranda rights (A. 67-68). Thereafter Detective Spano began questioning petitioner as to the circumstances surrounding petitioner's gunshot wound. Petitioner changed his story from the one he had given previously, and then said:

"'Look, while I am telling you this, there is something else I have to tell you.'

Q. Did you ask him or did he say this to you? A. He was telling me, sir. He said that a few days previous he had done a stick-up and that he stuck up a beauty salon.

Q. Now, before you go any further, officer, at that time, on that date, did you have any knowledge whatsoever of a stick-up of a beauty salon?
A. No.

Q. Continue. A. I asked him to describe the place that he is supposed to have stuck up. He said it was somewhere within a few blocks' radius of the Hilton Hotel. I said, 'Have you any idea what precinct it might have been in?' He stated, 'No.' I said, 'Is there anything that you could describe it?' He said, 'No. It

is a few blocks from the Hilton Hotel.' He said you have to go up on an elevator. I said, 'Do you recall at least what floor it was on?' He said, 'No.' He says, 'I know it was a beauty salon.'

Q. Did he say how he stuck it up? A. All he said is that he went in there and he stuck it up and there was a man and woman there.

Q. Did he say whether he used any weapon or not? A. He had his gun.

Q. He said he used his gun? A. Yes.

Q. Was he referring to any particular gun? A. To this particular gun I had in my possession.

Q. Did he say he did it with anybody? A. I asked him was Wyatt in on that one in the beauty salon. He stated that Wyatt was downstairs". (A. 72-73).

Detective Spano testified to the same effect at the trial of petitioner (A. 89-99), stating, particularly, that after questioning Wolfrath the latter had said "There is something I have to tell you," (A. 97) whereupon he volunteered to Detective Spano the fact that he had robbed the Don-Lee Studios. Prior to this admission, Detective Spano had no knowledge of the alleged robbery (A. 98).

Clearly the circumstances surrounding this admission are far different from those surrounding the usual case where a confession is ruled inadmissible on the grounds that it is the product of mental or physical coercion. The prime purpose of the exclusionary rule is to deter future unlawful police conduct and therefore effectuate the guarantee of the 4th Amendment against unreasonable searches and seizures United States v. Calandra, 414 U.S. 339, 347; Elkins v. United States, 364 U.S. 206, 217. But here we have a situation where petitioner, a victim of a gunshot wound, was being questioned concerning said wound and, out of the blue, confessed to a totally unrelated crime. Detective Spano was not questioning petitioner about the robbery, indeed, he didn't even know about the robbery until petitioner volunteered the information. No pressure was nor could have been put upon petitioner to confess to this crime, the raison d'etre for the rule, because Detective Spano was unaware that a crime had been committed, much less that petitioner was the perpetrator. Petitioner gratuitously offered up to the Detective the information, in order to get even with Robert Wyatt (who was, in petitioner's mind, trying to stick Wyatt's wife with the gun possession charge).

Indeed, the facts of this case differ significantly from other cases where confessions were excluded at trial because drugs were administered prior to a confession. In Jackson v. Denno, 378 U.S. 368 (1963) the prisoner was accused of robbing a hotel and fatally wounding a policeman, himself receiving two bullet wounds. Questioned at the hospital shortly after being admitted (at 2:00 a.m. prior to being given a drug), Jackson confessed. Sometime later Jackson was given Demerol and Scopolamine, the latter familiarly known as truth serum. Immediately thereafter, an Assistant District Attorney,

"in the presence of police officers and hospital personnel, questioned Jackson, the interrogation being recorded by a stenographer. Jackson, who had been shot in the liver and lung, had by this time lost about 500 cc. of blood. Jackson again admitted the robbery in the hotel, and then said, 'Look, I can't go on.' But in response to further questions he admitted shooting the policeman and having fired the first shot." Jackson v. Denno, supra 371.

The Supreme Court in Jackson held that New York's procedure for determining the voluntariness of confessions was inadequate and remanded for a hearing. New York's response was the institution of the Huntley hearing, and since such a

hearing was given to the instant petitioner, Jackson is not precisely in point. However, it remains apparent that the facts in Jackson differ widely from those in the instant case: no truth serum was administered here, no testimony was given that defendant was in great pain from his wounds and gasping for breath, no drugs were administered to cause defendant to confess, and Detective Spano did not have knowledge that petitioner had in fact committed the crime to which he confessed, nor that a crime had even been committed.

See also, Townsend v. Sain, 372 U.S. 293 (1962) which involved the administration of a truth serum to a defendant charged with murder. Following an informant's tip, Townsend, a narcotic's addict, was arrested shortly before 2 a.m. on New Year's Day, 1954. He was questioned off and on until 5:00 a.m. after which time there was no questioning for several hours. At about 9:30 p.m. of the same day, petitioner complained that he was suffering from withdrawal symptoms and that he needed a fix. A doctor was called who gave Townsend a combined dose of phenobarbital and scopolamine, the truth serum. Questioning of petitioner then resumed, whereupon a confession was extracted. There was also testimony by Townsend that the police officers had threatened to shoot petitioner

if he did not confess. The court remanded for a hearing, stating that it was difficult to imagine a situation where a confession was less the product of free will than where truth serum had been administered, Townsend v. Sain, supra at 308.

Clearly the above two cases involved factual patterns significantly different from the instant one: There the application of the exclusionary rule would have the desired affect of curbing unlawful police conduct; here it would not.

This Court was recently called upon to determine the voluntariness of an accused's confession, Lewis v. Henderson, 520 F. 2d 896 (1976). Lewis was arrested at 8:30 p.m. February 17, 1958, on the complaint of a third party. While the events surrounding defendant's questioning are in dispute, Lewis testified that he was subject to interrogation and beatings by the police, denied food and sleep, whereupon he gave in at 2:00 p.m. on February 18, and led the police to the stolen money. Shortly thereafter he confessed. Not once during his detention by police was he advised of his right to remain silent or of his right to counsel. In addition, at no time was he allowed to see or speak to anyone but the police.

This Court, in discussing the facts surrounding Henderson's arrest, thought the Supreme Court cases of Haynes v. Washington, 373 U.S. 503 (1963) and Haley v. Ohio, 332 U.S. 596 (1948) particularly relevant, because the techniques used in those cases were used in Henderson.

Henderson, Haley and Haynes, however, are distinguishable from this case precisely because in this case no techniques were used to coerce a confession from Wolfrath. The very reasons for the development of the exclusionary doctrine are not present in this case and therefor the District Court erred in applying it to these facts.

POINT III

THE INTRODUCTION OF PETITIONER'S CONFESSION AT TRIAL, EVEN IF INVOLUNTARY, IS HARMLESS ERROR

Once the district court determined that Wolfrath's first confession was involuntary, it had to decide whether or not the introduction of such a confession was harmless error. Relying upon the case of Chapman v. California, 386 U.S. 18 (1967) and citing Payne v. Arkansas, 356 U.S. 560 (1968), the district court determined that the introduction of the evidence was not harmless and that a new trial should be granted.

The per se reversal rule laid down in Chapman (that some constitutional rights are so basic that their infraction can never be treated as harmless error) has been considerably ameliorated by later decisions, see Harrington v. California, 395 U.S. 250 (1969), particularly the dissenting opinion at 255. Furthermore, the district court's reliance on Payne v. Arkansas, supra, is misplaced, since Payne involved a gross violation of the accused's constitutional rights. There the accused was held incommunicado for over 48 hours, not given any food for over 24 hours, told that there was a lynch mob outside waiting to "get" him, but that if he confessed, the police would try to keep them away, a far cry from the facts of the case.

Moving away from the per se rule of Chapman, supra, in Milton v. Wainwright, 407 U.S. 371 (1972), the State introduced a confession obtained by a police officer who posed as a fellow prisoner and was confined in the cell with the defendant. According to the dissent, it took thirty-six hours of prodding to induce the defendant to talk. The defendant had already been indicted and was represented by counsel. The Court found that the introduction of the confession was harmless beyond

a reasonable doubt, citing Chapman, supra and Harrington v. California, 395 U.S. 250 (1969). It stated at 407 U.S. 377-78:

"[W]e do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the State Court fourteen years ago by use of evidence not challenged here; the use of the additional evidence challenged in this proceeding and adequately open to challenge was, beyond reasonable doubt, harmless."

Milton is significant because rather than hold that some errors are so egregious as to warrant automatic reversal no matter what the weight of the other evidence, it holds that all of the evidence should be examined to determine whether the error is harmless or not.

See also, Justice White's concurring opinion in the recent Supreme Court case of Wainwright v. Sykes, 45 U.S.L.W. 4807, 4813 (June 23, 1977).

In United States ex rel. Moore v. Follette, 425 F. 2d 925 (2d Cir.) cert. den. 90 S. Ct. 2189 (1970), the Court found that the introduction of an allegedly improper confession was harmless error where there was other overwhelming evidence of guilt, including another confession, the testimony of a co-defendant, and no serious defense.

This Court has found that a statement arguably elicited in violation of Miranda and introduced at trial was harmless error where there was other overwhelming evidence of guilt. United States ex rel. Hines v. LaVallee, 521 F. 2d 1109 (2d Cir. 1975) cert. den. 96 S. Ct. 884. In United States v. Williams, 524 F. 2d 407 (2d Cir. 1975), the court found it harmless error where an FBI agent testified that the defendant declined to make a statement after receiving his Miranda warning even though the testimony could have violated the defendant's Fifth Amendment right to be free from compulsory self-incrimination.

In United States v. Duvall, 537 F. 2d 15 (2d Cir. 1976), this Court found that the introduction of the defendant's Statement to an Assistant United States Attorney was harmless error, although it should have been suppressed. The defendant made the statements to the Assistant when he was brought to the Assistant so the Assistant could "get information" from him instead of being brought before a Magistrate. The Assistant exaggerated the possible sentence to 100 years and told the defendant he could leave if he answered his question. The defendant was then arraigned, more than twenty-one hours after arrest. Again, although the Court of Appeals agreed that the

statements should have been suppressed, the egregious nature of the Assistant's conduct was insufficient for a reversal since there was other overwhelming evidence of guilt. A similar analysis was made in Smith v. Estelle, 519 F. 2d 1267 (5th Cir. 1965); see, United States v. Sigal, 500 F. 2d 1118 (10th Cir.) cert. den. 419 U.S. 954 (1974); Philips v. Neil, 452 F. 2d 337 (6th Cir. 1971); Bledsoe v. Nelson, 432 F. 2d 923 (9th Cir. 1970); United States ex rel. Galloway v. Fogg, 403 F. Supp. 248 (S.D.N.Y. 1975).

In the instant case the evidence of petitioner's guilt is so overwhelming that the introduction into evidence of petitioner's confession to Detective Spano is harmless error.

Mrs. Sehnert, co-owner and one of the victims of the robbery at Don-Lee Studios, was the first to testify. At 8 o'clock in the evening of November 2, 1966, she was working at Don-Lee Studios with her husband (A. 126) when a man burst through the door and pointed a gun at her, saying, "This is a stick up. I don't want to hurt you, but I will kill you if I have to." (A. 129). Petitioner was approximately 8 feet from Mrs. Sehnert at the time. The lighting was good (A. 130). She asked petitioner if she could call out to her husband and explain to him what had happened so no one would get hurt and he said yes (A. 131).

In addition to herself and her husband, also present in the studio was her son and three customers (A. 128). Petitioner's gun was identified by Mrs. Sehnert and marked for identification as People's Exhibit 2. Mr. Greenwald, one of the customers, Mr. Sehnert, her son, and the other customers came out of their cubicles and petitioner lined them up against a wall in the office with their backs to petitioner. Mr. Sehnert was facing a mirror and was told by petitioner to get away from the mirror (A. 133). After everyone other than Mrs. Sehnert was lined up against the wall in the office, petitioner asked Mrs. Sehnert to go into the office. He came within two or three feet of her and she was looking at his face all of the time (A. 134). He went through the desk drawers in the office and when he didn't find anything he asked for money. Everybody was against the wall except for Mrs. Sehnert (A. 135). Mrs. Sehnert asked if she could reach for her purse which was beside the desk in order to get the money, and he said yes. He then tried to rip the phone out of the wall (A. 136), but was unable to, whereupon he left, locking the door behind him (A. 136). The entire robbery took 8 minutes, and during that time Mrs. Sehnert testified she had an opportunity to observe his face for between six and seven minutes (A. 135). Mrs. Sehnert then made an in-court identification of him (A. 138).

Mrs. Sehnert continued testifying that on Sunday, November 6, 1966, she and her husband met with Detective Hanford, (A. 140) at Bellevue Hospital, where they were being taken for a possible identification of the suspect. They saw the petitioner in a wheelchair (A. 141a) but did not approach him for 2 or 3 minutes (A. 141c); Detective Hanford went ahead to advise petitioner of his constitutional rights, as he later testified. After approaching him, she said "That is him" (A. 143) and he said "I did it" (A. 142a).

Don Sehnert, husband of Marion, testified to essentially the same facts as Marion (A. 144-180). He stated that the defendant's pistol was loaded during the robbery, something he knew because he could see the slugs through the opening in the cylinder.

Detective John Hanford testified that in connection with an investigation of an incident occurring at Don-Lee Studios, he met with Mr. & Mrs. Sehnert, the complainants, at Bellevue Hospital on November 6, 1966, introduced himself to the defendant at the hospital and advised him of his constitutional rights (A. 181-189). The defendant admitted having committed the robbery in the Don-Lee Studios on November 2, stating that Robert Wyatt, a former Don-Lee employee, had "set-up" the

"job" and had given him the gun with which to effect it. He explained that he was confessing in order to implicate Wyatt. When the complainants came over to the defendant, he said, "I did it" or "I was there". Wolfrath was "alert and responsive" (A. 189-180).

Thus, regardless of and without considering the confession to Detective Spano, the People nevertheless have an overwhelming case against Wolfrath: two positive eyewitness identifications of petitioner, as well as a voluntary confession to Detective Hanford (and the Sehnerts) made at Bellevue Hospital.

It must be emphasized that the district court only held the first confession to Detective Spano involuntary. The second one, to Detective Hanford, was good. Further, when two confessions are made, and the first is bad, this still doesn't preclude the use of the second one at trial, United States v. Bayer, 331 U.S. 532 (1946).

Therefore, based upon all the facts of this case, the introduction of the first confession into evidence, even if involuntary, is harmless error.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE REVERSED AND THE PETITION
DENIED IN ALL RESPECTS

Dated: New York, New York
November 30, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellant

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ALLAN S. MOLLER
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

MARY KO , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Respondent-Appellant
herein. On the 30th day of November , 1977 , s he
served the annexed upon the following named person :

MARVIN E. GOTKIN
250 West 57th Street
New York, New York 10019

Attorney in the within entitled appeal by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by
the Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that purpose.

Mary Ko

Sworn to before me this
30th day of November , 1977

Allen Smoller
Assistant Attorney General
of the State of New York